JIMI MANTALI & ORS

v.

SUPERINTENDENT OF LANDS & SURVEYS SAMARAHAN DIVISION & ANOR

HIGH COURT SABAH & SARAWAK, KUCHING
RHODZARIAH BUJANG JC
[SUIT NO: 22-57-2007-II]
26 NOVEMBER 2010

NATIVE LAW AND CUSTOM: *Land dispute - Customary rights over land - Whether rights acquired by plaintiffs' occupation of land - Whether mixed zone land - Whether state owned land - Whether rights defeated*

The plaintiffs claimed, *inter alia*, native customary rights ('NCR') over a parcel of land described as Lot 3403, Block 59, Muara Tuang Land District (the 'land') and for titles to be issued to them. The plaintiffs asserted that they had been in occupation of the land and so too their parents and grandparents before them prior to 1 January 1958 until to date. The plaintiff also claimed damages because the 1st defendant had destroyed oil palm trees that they had planted on the land in a joint venture agreement with a company called Wholly Plantation Sdn Bhd in 2005. The said company was demanding from the plaintiffs for the losses incurred as a result of the said act of the 1st defendant. The plaintiffs claimed that the defendants had recognised their NCR as their representative had meetings with the 1st defendant's officers in 1997 in which the plaintiffs were asked to submit formal applications for the issuance of the titles which did not materialise.

The defendants denied the existence of the plaintiffs' NCR because it was contended that the land was mixed zone land leased to a company called Wee Kheng Chiang & Co Ltd in 1949 by the State. The lease was surrendered to the State in 1955. Further, a gazetted settlement order in 1977 confirmed the land as mixed zone land. In view thereof, there could be no NCR acquired or inherited by the plaintiffs. It was also contended that the land belonged to the State when the oil palm plantation activities had begun. As such, the defendants were not liable in damages for the destruction of the oil palm trees unlawfully planted on State land.

Held (dismissing the plaintiff's claim):

(1) The issue for determination was whether the plaintiffs established their NCR over the said land before 1 January 1958 pursuant to s. 2 of the Land Code. Their usage of the land was not doubted based on the correspondences and records produced in court. However, the question was when the land clearance and/or the cultivation started. Both the physical acts and the time of commission of the act was what determined whether the plaintiffs had NCR over the said land, not just the acts themselves. (paras 16-17 & 23)

(2) The plaintiffs themselves admitted that the land was leased to Wee Kheng Chiang & Co. Ltd and that the said company cleared and planted tapioca over the land. The lease was registered in February 1949 and for a period of 60 years. It reverted to the State *vide* a Memorandum of Revision of Land to the Crown dated and registered on 30 September 1955. By operation of s. 5(1)(a) of the Land Classification Ordinance 1948 the land was mixed zone land and under s. 5(3)(a) thereof and its application in *Pengiran Hashim Pengiran Ahmad v. Awang Ismail Pengiran Awg Zainuddin*, the clear legislative intent was that there should not be any native customary rights created over the land as per s. 2 of the Land Code (Sarawak). (paras 25 & 27-29)

(3) The expert report on the aerial photograph taken in 1947 showed that the land was covered with primary forest with no sign of land clearance. The plaintiffs gave evidence that the creation of the NCR was through land cultivation but there was no such evidence from the photograph taken. (para 30)

(4) The aerial photograph taken in 1951 showed that there was land clearance but the possibilities were that either the plaintiffs or Wee Kheng Chiang & Co Ltd cultivated the land. When probabilities were equal, the burden of proof on the plaintiff to prove his case was not discharged. The initial burden of proof rightly rested on the plaintiffs being the persons asserting NCR over the land. In addition, the relevant documentary evidence from the Samarahan Land Office clearly stated in the remark column that the period of land clearance or cultivation was either in the 1970s, 1980s or 1990s. Although the documents

were prepared by the 1st defendant's officer, they would not have been prepared in anticipation of the trial as even in the plaintiff's own evidence, the meetings which the 1st defendant held over their claims to the land were done in 1996 and 1997. There was also the inherent probability that what was stated in the remark column of the documents could have only come from the claimants' mouths and not created by the 1st defendant's officers to defeat the plaintiffs' claim for NCR. (paras 31-32)

(5) The United Nations Declaration on the Rights of Indigenous Peoples was not adopted as it did not relate to the matter in controversy since the decided cases from the appellate courts had settled the issue of the establishment of native customary rights which principles were applicable, and secondly, there was no proper vehicle for the domestication of international laws by virtue of an enabling provision in the Federal Constitution or in the absence of such a provision, a law enacted specifically by Parliament for that very purpose. (para 36)

Case(s) referred to:

Ab Rauf Mahajud v. State Government of Sabah Anor Board of Trustees of Sabah Parks [2009] MLJU 1356 ***(refd)***

Hamit Matusin & Ors v. Superintendent of Lands & Surveys & Anor [1991] 2 CLJ 1524; [1991] 2 CLJ (Rep) 677 HC ***(refd)***

Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors [1998] 2 CLJ 665 CA ***(refd)***

Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors [2005] 4 CLJ 169 CA ***(refd)***

Madeli Salleh v. Superintendent of Lands & Surveys & Anor [2005] 3 CLJ 697 CA ***(refd)***

Miller v. Minister of Pensions [1947] 2 All ER 372 ***(refd)***

Noel Kenneth Davidson v. Firm Corporation Sdn Bhd [1994] 2 CLJ 637 HC ***(refd)***

Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors [2001] 2 CLJ 769 HC ***(refd)***

Pengiran Hashim Pengiran Ahmad v. Awang Ismail Pengiran Awg Zainuddin [1995] 1 LNS 157 HC ***(refd)***

Superintendent of Land & Surveys Miri Division & Anor v. Madeli Salleh [2007] 6 CLJ 509 FC ***(refd)***

Superintendent of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal [2005] 3 CLJ 555 CA ***(refd)***

Legislation referred to:
Federal Constitution, arts. 8(5)(c), 89
Land Classification Ordinance 1948, s. 5(1)(a), (3)(a)
Land Code (Cap 81) (Sarawak), ss. 2, 13

For the plaintiffs - Desmond Kho (See Chee How with him); M/s Baru Bian Advocates
For the defendants - Saferi Ali, State Legal Officer; State AG's Chambers

Reported by Usha Thiagarajah

JUDGMENT

Rhodzariah Bujang JC:

[1] The plaintiffs, for themselves and on behalf of the rest of their villagers at Kampung Tambirat, Asajaya in the district of Samarahan are claiming native customary rights over a parcel of land described as Lot 3403, Block 59, Muara Tuang Land District. They claimed that their acquisition of native customary rights over the said land was by themselves and/or their parents or grandparents in accordance with the provisions of the Sarawak Land Code 1958 and/or its predecessors and by common law. The plaintiffs asserted that since the times of their grandparents or parents, they all had prior to 1 January 1958 until to date, been in occupation of the said land.

[2] In this action, the plaintiffs are suing the Superintendent of Lands and Surveys and the Government of Sarawak for, *inter alia*, a declaration that they have acquired native customary rights over the said land and for titles to be issued to them. There are also prayers for damages because the oil palm trees which the plaintiffs planted in a joint venture agreement with a company, Wholly Plantation Sdn Bhd in February 2005 were destroyed by the 1st defendant and/or its servants and agents in December 2005 and for which losses amounting to RM532,227 (for the preparation and planting of the oil palm) and RM4,790,000 (for potential gain and profits) were suffered by them. The said sums were infact demanded from the plaintiff by Wholly Plantation Sdn. Bhd.

[3] It was also pleaded in the plaintiffs' statement of claim that there had infact been recognition by the defendants of their native customary rights over the said land as evidenced by the fact that in

early 1997 the defendants agreed to issue them with titles under s. 13 of the Sarawak Land Code and efforts were made to survey the said land for that purpose. A specific meeting on 2 May 1997 was actually held between the plaintiffs' representative, one Bujang bin Bakar and the 1st defendant's officers in which the plaintiffs were asked to put in formal applications for the issuance of the titles. This of course did not materialize.

[4] In their defence, the defendants denied the existence of the plaintiffs' native customary rights over the said land because it was infact categorized as mixed zone land and part of Lease of Crown Land No. 1958 issued in 1949 to a company called Wee Kheng Chiang & Co. Ltd. The said lease was surrendered to the Crown *vide* an instrument No. L3381/1955 and registered in September of the same year with Kuching Land Registry Office. Further, by a settlement order made on 24 January 1977, the said land was designated as Lot 468 and was confirmed to be mixed zone land as when it was gazetted so *vide* Gazette Notification 758(6) dated 3 June 1952. Being mixed zone land, the defendants contended, no native customary rights can be acquired or inherited on the said land and that in February 2005, when the oil palm plantation started, the said land belonged to the State. Therefore the defendants were not liable in damages for the destruction of the oil palm unlawfully planted on State land.

[5] The plaintiffs called a total of four witnesses. The first witness was the first plaintiff himself who was 71 years of age at the time of the trial and a farmer. His evidence, which was repeated by the other witnesses, was that the plaintiffs had been clearing and working on the said land, which was just about 3-4 kilometers from their present village, Kampung Tambirat, in the middle of 1940s and their ancestors even before that. However, during the Japanese occupation the plaintiffs moved out of their village established on the said land called Kampung Subi and only returned in 1954 to continue farming in that area. Sweet potatoes, tapioca and other cash crops were planted by them. In addition, the plaintiffs used the land to forage for food like dammar and jelutong (wild rubber trees) for their livelihood.

[6] He testified that during the communist insurgency in the 1960s, the plaintiffs again stopped their activities on the said land and only resumed their farming and foraging in and around 1972.

[7] Encik Jimi bin Mantali further narrated the meeting Encik Bujang bin Bakar had with the 1st defendant's officers as pleaded in the statement of claim and the plaintiffs failed joint venture with Wholly Plantation Sdn. Bhd. which resulted in the losses suffered as stated earlier. He also mentioned that their then Penghulu, one Encik Tamel bin Mohamad, (whose evidence I shall narrate presently) was informed by the 1st defendant *vide* a letter dated 20 December 2005 that the said land together with six other parcels of land would be alienated to Sarawak Economic Development Corporation and Syarikat Cocolin Sdn Bhd.

[8] Penghulu Tamel bin Mohamad, aged 67 years old was also an assessor in the Native Courts. He too explained the history of his people who cleared the said land before the Japanese occupation, who foraged therein for jelutong and who used timber from it to build their houses. He testified that according to the Malay adat, once a person cleared the land, it became his customary land.

[9] The plaintiffs' third witness, Mr. Jong Nyong Po @ Yang Liangbao was from Wholly Plantation Sdn Bhd and was its director at that material time. He testified on the joint venture and that work on the land was done after his inquiry at the 1st defendant's Samarahan's office yielded a positive response that the plaintiffs' have native customary rights over the land. Through him was tendered two invoices (at pp. 3 and 4 of exh. P2) in which the amount of damages specified in the statement of claim were stated. More importantly for the plaintiffs, this witness testified that when he went to the Samarahan Land Office, he was given the documents exhibited at pp. 1-70 of exh. P1 which convinced him that the plaintiffs herein had native customary rights over the said land.

Documents From Samarahan Land Office

[10] These documents consist of, *inter alia*, a list of claimants from Kampung Tambirat for parcels of land including the said land in this case, minutes of meeting held by the 1st defendant's officers at their Samarahan Office, official memorandums written on minute sheets and letters from the said officers, all of which show that there was an effort on the part of the 1st defendant to determine the claims of the claimants named therein, survey the said land (and other parcels of land in the area) and to issue land titles to those whose claims were said to be genuine.

[11] The plaintiffs' last witness was the man who attended the meeting at the Samarahan Land Office, Encik Bujang bin Bakar, aged 64 years old. He too gave evidence on the clearing of the said land which gave a clearer picture of what happened all these years ago. The said land was cleared and settled by his father and the others during the Japanese Occupation after they left their village at Kampung Tambirat to hide from the Japanese but after the Japanese Occupation and when they went back to their village (Kampung Tambirat), the villagers still went back to the said land to collect jelutong, dammar and timber. He testified that sometime on 2 May 1997 at 2pm, the 1st defendant's officer named Ibrahim Lompok gave a briefing at the mosque of their village promising that the said land will be placed under s. 13 of the Sarawak Land Code and be given back to the people. The said officer also assured them that the 1st defendant recognized their native customary rights over the said land. He also mentioned meeting another one of the 1st defendant's officer on 27 December 2005, one Encik Halim Hj Sabil who told them that their application will be considered by the 1st defendant.

[12] The last piece of evidence from the plaintiffs was a report (exh. P4) from an expert in stereo-photogrammetric interpretation of aerial photographs, Dr. C.P. Gross. The admission of the report was agreed by the defendants' counsel and it was admitted without the Doctor being called to testify. In his analysis of the aerial photograph of the land taken in 1951, he found evidence of land clearing.

The Defendants' Case

[13] The case for the defendants is built on the evidence of their sole witness, a Superintendent of Lands & Surveys for the 1st defendant's Samarahan Office and also a report (exh. D2) from their own expert in stereo-photogrammetric interpretation of aerial photographs, Encik Saiful Izan Kassim. That report, also admitted without the maker being called, is not substantially different from that of Dr. C.P. Gross for it also shows that for the aerial photograph taken in 1951, there was evidence of clearing of the said land. It is different in that other than the 1951 aerial photograph, the said expert also interpreted an aerial photograph of the land taken in 1947 which showed the said land was covered with primary forest ie there was no evidence of land clearing then.

[14] The Superintendent, Encik Taib bin Hj Belal testified that the said land was leased to Wee Kheng Chiang & Co. Ltd. *vide* Lease of Crown Land No. 1958 in 1949 and that the said land was and has always been classified as mixed zone land. The land was surrendered to the Crown as pleaded in the defence in 1955 and the settlement order made on 24 January 1977 confirmed that the land was mixed zone land. Being so, he said no native customary rights can be created over it and he confirmed that the said land has been alienated to Sarawak Economic Development Corporation and Syarikat Cocolin Sdn Bhd.

[15] The defendants' counsel's cross-examination of the plaintiffs' witnesses, ie Encik Jimi bin Mantali and Penghulu Tamel bin Mohamad saw these two witnesses admitting knowledge of the said land being leased to Wee Kheng Chiang & Co. Ltd. with Encik Jimi bin Mantali saying that it was his father who leased the said land to the company (p. 6 lines 23-24 of the notes of proceedings) and that the company planted tapioca on the land. The tapioca he said was destroyed by wild boars and his father and the others took back the land from the company. The Penghulu confirmed that the villagers worked with the company to plant tapioca on the said land.

Creation Of Native Customary Rights

[16] Section 2 of the Sarawak Land Code defines native customary land and gives three meanings to it. The first definition is what is applicable to this case and that is:

> Land in which native customary rights, whether commercial or otherwise, have lawfully been created prior to the 1st January 1958 and still subsist as such. (paragraph (a) thereof).

[17] Thus, what I would be concerned here is whether the plaintiffs have established that their native customary rights over the said land was created before 1 January 1958 and the same has not been extinguished.

[18] Mr. See Chee How in his written submission had admirably and laboriously take me through the legal history in the recognition of native customary rights, particularly for the Malays, both statutory and in common law starting from the time of the first White Rajah, Sir James Brooke, ie when the Sultan of Brunei ceded Sarawak to him. In the Transfer Agreement of 1841 which formalized that transfer of power, Sir James Brooke promised that

"the laws and customs of the Malays of Sarawak shall forever be respected since the country of Sarawak has hitherto been subject to the government of the Sultan of Brunei the Pengeran Muda and Malayan Rajas." A

[19] Many other laws and promulgations were made thereafter which all made for interesting reading but one which would only serve to colour this judgment and add to its length but would not be directly relevant to the issue at hand. I say so because, in fairly recent times, certain definitive cases have been decided by the Courts on native customary rights – at home the decision of Haidar bin Mohd Noor J (as His Lordship then was) in *Hamit Matusin & Ors v. Superintendent of Lands & Surveys & Anor* [1991] 2 CLJ 1524 ; [1991] 2 CLJ (Rep) 677; that of Ian Chin J in *Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 2 CLJ 769 and the Court of Appeal's decision on the said case ie *Superintendent of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal* [2005] 3 CLJ 555, as well as the decision of the Court of Appeal in *Madeli Salleh v. Superintendent of Lands & Surveys & Anor* [2005] 3 CLJ 697 and when it was appealed, the decision of the Federal Court in *Superintendent of Land & Surveys Miri Division & Anor v. Madeli Salleh* [2007] 6 CLJ 509. B C D E

[20] In Semenanjung Malaysia, both the Court of Appeal in *Kerajaan Negeri Johor & Anor v. Adong bin Kuwau & Ors* [1998] 2 CLJ 665 and the Federal Court in *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* [2005] 4 CLJ 169 have recognized the rights of the aborigines to the land over which they lived and forage for food and livelihood. In that decision of the Federal Court in *Sagong Tasi (supra)*, it was held that the aborigine's right is not only over the land but in the land itself, ie a proprietary right and an extension to the *ratio* in *Adong bin Kuwau*'s case *(supra)* which decision only recognized the aborigine's right over the land. The groundbreaking decision of Ian Chin J in *Nor Anak Nyawai*'s case (supra) which recognized the Ibans' customary right to live off the land was affirmed by the Court of Appeal and in the judgment of Skinner J (as His Lordship then was and sitting in the Court of Appeal) in *Madeli Salleh*'s case *(supra)* it was held that Madeli Salleh (also a Malay) still has native customary rights over land on which he had fruit trees and which he visited only once a month; F G H I

just like the plaintiffs in this case who farmed the said land but lived in Kampung Tambirat. That decision was affirmed by the Federal Court.

[21] I made mention of these cases as a reminder to myself on the established principles of law on native customary rights applicable to the case before me and as a tribute to the diligence of the plaintiffs' counsel in condensing all of them and more, in his written submission.

[22] Therefore, if I believe the plaintiffs' witnesses, and at first blush I may have no reason not to do so, it would mean that that they have by their act in clearing the said land, planting their cash crops and collecting jelutong, dammar and timber from it, established native customary rights over the said land. However, there is a big doubt on such line of thinking as raised in the submission of Encik Saferi bin Ali, counsel for the defendants. This submission I will allude to presently but first I must explain myself for saying that first line in this paragraph.

[23] I said there are no apparent reasons to doubt the plaintiffs usage of the land as aforesaid because the correspondences and records produced in exh. P1 clearly show that the 1st defendant themselves were well aware of and were processing the plaintiffs' claim, (amongst others) to the said land. Although these documents were only agreed as to authenticity and not content, their existence render probable the plaintiffs' assertion that they had been working and foraging on the said land. The important point to note, however is this. When did the land clearance and/or cultivation start, for the physical act and the time of commission of the act is what determines whether the plaintiffs have native customary rights over the said land; not just the acts themselves. In saying this, I also fully appreciate the position of the defendants in cases of this nature for claims of native customary rights is relatively easy to make and open to abuse. It is, I am sure, difficult to separate the genuine claimants from those who were out to exploit the situation, who knew that the current evidential requirement on proof in native customary rights cases allows reception of evidence based on hearsay since most of the original settlers/occupants of the native customary land who foraged, cleared and/or cultivated the land way before 1958 would be long gone when the case goes to court. It is also to be noted that the evidence of the plaintiffs that their village, Kampung

Tambirat is more than a 100 years old is unchallenged and the 1st defendant being the administrator of land for the state would have known of the existence of this village, whether it is that old or a recent establishment. But it is also important for me to bear in mind that the land the plaintiffs are claiming are not in this village – it is further away – 3 to 4 kilometers and in the old days only accessible by river; not by land. On the other hand, the 1st defendant's own willingness to sit down and meet the claimants and/or representatives, to consider their claims of native customary rights over the said land, is a form of validation of the existence of the village and the claimants usage of the land as aforesaid, lest why would they need to trouble themselves to discuss these claims with them?

[24] Leaving that rhetorical question aside for now, I would revert to the submission of Encik Saferi bin Ali where I said the doubts on the plaintiffs' native customary rights were raised.

The Doubts

[25] These doubts have got to do with, firstly, the undisputed fact that this land was and still is classified as mixed zone land. I said undisputed because the plaintiffs themselves admitted that there was a lease issued to Wee Kheng Chiang & Co. Ltd. in 1949. The plaintiffs' first witness even said that his late father was the one who 'leased' the land to Wee Kheng Chiang & Co. Ltd. (an error of fact, obviously) but the important point is he and the third witness confirmed that the said company cleared and planted tapioca over the said land.

[26] Encik Saferi bin Ali submitted by referring to Gazette Notification 758(6) dated 3 June 1952 (at pp. 6-10 of exh. D1) and s. 5(3)(a) of the Land Classification Ordinance 1948, that since the said land was classified as mixed zone land, no native customary rights can be created over it. This Ordinance actually classified land into five categories, ie mixed zone land, native area land, native customary land, reserved land and interior area land.

[27] Now, s. 5(1)(a) of the said Ordinance defines mixed zone land as land lawfully held, but not necessarily occupied, by a non-native on 1 January 1949, by virtue of documentary title and in sub paragraph (c) thereof, land lawfully leased or subleased to a non-native for a period exceeding one year, the lease or sub-lease still subsisting on 1 January 1949.

[28] The lease issued to Wee Kheng Chiang & Co. Ltd. (appearing at p. 1 of exh. D1 which incidentally is the defendants' bundle of documents agreed as to authenticity) was registered in February 1949 and was for a period of 60 years. It was of course reverted back to the State *vide* Memorandum of Revision of Land To the Crown dated and registered on 30 September 1955. Therefore by operation of the said Ordinance, the said land was mixed zone land.

[29] The important provision of the said Ordinance is s. 5(3)(a) which section was amended by the Land Classification (Amendment) Ordinance 1954 and it provides as follows:

> Whenever the Governor in Council by notification in the Government Gazette in the exercise of his powers under subsection (2) of this section has declared any Native Area Land or Interior Area Land to be Mixed Zone Land, then the following provisions shall thereupon have effect:
>
> (a) no native customary rights shall, whether by felling of virgin jungle or otherwise, thereafter be created within the boundaries defined by such notification.

Encik Saferi bin Ali also referred to the decision of Richard Malanjum J (as His Lordship then was) in *Pengiran Hashim bin Pengiran Ahmad v. Awang Ismail bin Pengiran Awg. Zainuddin* Civil Appeal No. MR 4 of 1987; [1995] 1 LNS 157 where the 1948 Ordinance was mentioned and used to deny the respondent of their claim of native customary rights over land which was declared as mixed zone land *vide* Gazette Notification No. 374/1951. It must first be noted that this cited case concerns an appeal from the decision of a settlement officer who decided that the two parcels of land claimed by both the appellant and respondent as their native customary rights land rightly belonged to the appellant. The learned Magistrate who heard that appeal ruled in favour of the respondent. On appeal, this is what His Lordship said with regards to the issue relevant at hand,

> Now, learned Counsel for the respondent did not dispute that the said lands were within the area declared as Mixed Zone in 1951 (G.N. No. 374 dated 2 April 1951). And at that time areas under Mixed Zone were affected by 1948 Ordinance, as amended which prohibited the creation of NCR in such a zone after 24 April 1954. Thus even if the respondent took over the said lands as of 1 March

> 1954 he could not have satisfied the requirement of s. 66 of the 1933 Ordinance which, *inter alia*, recognized NCR on the basis of continuous occupation or cultivation within three years. Obviously the respondent had only over a month after the purchase when the 1948 Ordinance, as amended came into force. Hence, due to the zoning of the said lands and the 1948 Ordinance, as amended, it could not be said that the respondent had acquired NCR by the time the settlement of the said lands was carried out. In view of the law applicable at the material time the length of stay of the respondent on the said lands became irrelevant. I am inclined therefore to agree with the learned Counsel for the appellant on such points.

It looks to me therefore, by the provision of law quoted above and the example of its application in *Pengiran Hashim*'s case *(supra)*, the clear legislative intent is that there should not be any native customary rights created over the said land in the way as defined by s. 2 of the Sarawak Land Code which I have mentioned earlier in this judgment. In the premises, I ought to dismiss the plaintiffs' claim herein with costs to the defendants.

[30] If however, my interpretation of the law above and facts applicable to it is faulted, then the expert report on the aerial photograph adduced by the defendants would also point me to the same direction and conclusion. To recapitulate, the said report shows that in 1947 the said land was covered with primary forest with no sign of land clearance. Now, although I do not deny that for the Malays in Sarawak, the creation of native customary rights can be through foraging in the jungle, the plaintiffs in this case gave evidence that its creation was also through land cultivation. Therefore there must surely be evidence of land clearance in 1947 when the photograph was taken given that the plaintiffs' witnesses (Jimi bin Mantali and Penghulu Tamel bin Mohamad) have testified that the land clearance was done before the Japanese Occupation (which in Sarawak was December 1941) and resumed after the Japanese left (which was in September 1945). When the Japanese occupied and left Sarawak, all that happened before 1947 and evidence of this farming activity should therefore be on the ground then.

[31] As for the 1951 aerial photograph which shows land clearance, Encik Saferi bin Ali submitted and I agree with him, that the evidence adduced shows that the land was cleared by Wee Kheng

Chiang & Co. Ltd. for tapioca cultivation when the lease was issued to them in 1949. The fact of such cultivation being also admitted by the plaintiffs' own witness rendered the defendants' contention that the evidence of land clearance should not be interpreted in the plaintiffs' favour justifiable. Put in another way, the evidence of the aerial photograph of 1951 is capable of two equal interpretations ie that the plaintiffs cultivated the said land and Wee Kheng Chiang & Co. Ltd. cultivated it too. Both are probabilities and Mr. See Chee How's quotation from the judgment of Denning J in *Miller v. Minister of Pensions* [1947] 2 All ER 372 lifted from the judgment of Ian Chin J in *Noel Kenneth Davidson v. Firm Corporation Sdn Bhd* [1994] 2 CLJ 637; [1994] 2 MLJ 40 at p. 47 shows that when probabilities are equal, the burden of proof on the plaintiff to prove his case is not discharged. The initial burden of proof rightly rests on the plaintiffs in this case being the persons asserting native customary rights over the said land. This reasoning represents the second doubt I have about the probability of the plaintiffs' case. I have also, in addition, a third doubt and that is on the documents referred to by the plaintiffs' third witness and which I discussed earlier under the heading 'Documents from Samarahan Land Office'.

[32] Encik Saferi bin Ali referred me to pp. 3-17 of exh. P1 ie the list of persons including the plaintiffs claiming native customary rights over the said land wherein under the "remark" column it was stated when the lands were cleared or cultivated. In that column the period of such activities was clearly stated as either to be in the 1970s, 1980s or 1990s. I do note that these documents were prepared by the 1st defendant's officer but it was not prepared in anticipation of this trial as even in the plaintiffs' own evidence the meetings which the 1st defendant held over their claims to the land were done in 1996 and 1997. Infact the official documents of the 1st defendant in exh. P1 were all dated 1997 (except for the official memorandum from the Superintendent of Lands & Surveys at pp. 18-19 thereof which was dated 14 December 2005). In this official memorandum from the said Superintendent to the Director of Lands & Surveys, again it was stated that the plaintiffs' fourth witness Encik Bujang bin Bakar had informed their office that he only cultivated the land in 1982 'bersama penduduk kampong lain' (translated to mean 'together with the other villagers'). Aside from the fact that these documents form part of the plaintiffs' own evidence, there is the inherent probability that what was stated in

the remark column of these documents by the 1st defendant's officer(s) that the cultivation/clearance only started from 1970s onwards, could only come from the mouths of these claimants – not created by the 1st defendant's officers to defeat the plaintiffs' claim for native customary rights in this case. This was precisely why I said earlier that only at first blush did it appear that the plaintiffs' clearance and cultivation of the said land was taken as establishing native customary rights over the said land. When all the evidence have been considered in depth, and given that the plaintiffs' own documentary evidence is contradictory of the oral testimonies of their witnesses, they have failed to prove that they have native customary rights over the said land.

[33] In the premises, I again reaffirmed my earlier conclusion to dismiss the plaintiffs' claim with costs to be taxed unless agreed. If not agreed, getting-up is capped at RM20,000.

Postscript To The Judgment

[34] As a postscript to this judgment, I would like to address an interesting proposition made by Mr. See Chee How in his written submission. He urged that I adopt in this judgment the United Nations Declaration on the Right of Indigenous Peoples. In this regard, he has referred to the High Court decision in *Nor Anak Nyawai*'s case *(supra)* in which Ian Chin J had mentioned this Declaration which at the time of His Lordship's judgment was only a draft and therefore His Lordship declared that it had no role to play in his judgment and did not form part of the law of the land.

[35] Since then, more particularly on 13 September 2007, United Nations General Assembly had adopted this Declaration and Malaysia was one of the 144 states who voted in favour of it.

[36] Mr. See Chee How in his submission had echoed the sentiments of Prof. Ramy Bulan which was expressed in her paper titled Legal Perspective on Native Customary Rights in Sarawak published by the Human Rights Commission of Malaysia that this Declaration be made part of our law for the reasons, amongst others that the Civil Law Act 1956 and our Federal Constitution do not prohibit us from doing so and because the aborigines hold special position in the Federal Constitution (art. 8(5)(c)) – Mr. See Chee How said the natives of Sarawak also hold special position in the

A Federal Constitution under art. 89 thereof. I do not think I would be derogating the rights of the natives in Sarawak or their special position in the Constitution when I decline to make an express acceptance of the declaration in this judgment for two reasons:

B **First,** it is not called for because it does not in any way relate to the matter in controversy since the decided cases from the appellate courts which I mentioned earlier have settled the issue of the establishment of native customary rights and which principles I could apply in this judgment.

C **Secondly,** even at the risk of being accused as being ultra conservative, I believe there must be a proper vehicle for the domestication of international laws such as Declarations made by the United Nations, in the form of an enabling provision in the supreme law of our land, the Federal Constitution, as is the D case in Philippines and Cambodia or in the absence of such provision, then a law enacted specifically by Parliament for that very purpose. In my view, there must be an express legislative intent for the adoption of international law (be it custom treaties or United Nation Declarations) before the same can be E relied on and applied by the courts. The jurisdiction to apply such law must, in other words, be conferred before it be exercised and in the event of conflict, I might just add, the superiority of the laws of our land should still prevailed.

F **[37]** Though such an enabling provision or law is still nowhere in sight in Malaysia but in respect of the rights of the indigenous people, I also hold the view that our laws, both the Federal Constitution and the cases decided by the courts so far have afforded protection to the rights of these special class of persons; G not in any way inferior to those stated in the Declaration. Infact in *Ab Rauf bin Mahajud v. State Government of Sabah Anor Board of Trustees of Sabah Parks* [2009] MLJU 1356, Datuk Linton Albert J had decided that the plaintiffs' inherited customary rights to harvest turtle eggs in Pulau Sipadan is intact despite later laws enacted H which prohibited the harvesting of such eggs. Decisions such as this, I am sure, should for the time being, quell the apprehension of those asserting native customary rights in the States and which should mollify the champion of such rights like Mr. See Chee How.

I